1997

Architerctural Committee of the Mt Olympus Cove Subdivision No 3 v. Amy E. Kabatznick : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ARCHITECTURAL COMMITTEE OF THE MT. OLYMPUS COVE SUBDIVISION NO. 3, Plaintiff and Appellant, v. Amy E. KABATZNICK, Defendant and Appellee.	Case No. 970188-CA Priority No. 15

BRIEF OF APPELLANT ARCHITECTURAL COMMITTEE OF MT. OLYMPUS COVE SUBDIVISION NO. 3

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH THE HONORABLE TYRONE E. MEDLEY PRESIDING

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April 18, 1997

Parties To The Proceeding

The following individuals, who are members of the Architectural Committee of the Mt. Olympus Cove Subdivision No. 3 and owners of property interests in the Subdivision, sought to be joined or substituted as parties to this action pursuant to an intermediate bench ruling of the trial judge. They were never accorded party status, as the trial judge either struck or dismissed attempts to amend the initial complaint to join or substitute them:

Joyce K. Ridd
James B. Streisand
Robert B. Wray

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OPENING BRIEF OF APPELLANT, ARCHITECTURAL COMMITTEE OF THE MT. OLYMPUS COVE SUBDIVISION NO. 3

The Architectural Committee of the Mt. Olympus Cove Subdivision No. 3 ("the Architectural Committee" or "the Committee") and three individual members of the Committee, Robert B. Wray, James B. Streisand and Joyce K. Ridd, respectfully submit their Initial Brief in support of the appeal of an order of the District Court of the Third Judicial District, dated November 8, 1996, and entered by the Honorable Tyrone E. Medley.

I. PRELIMINARY MATTERS

Statement of Jurisdiction.

The Utah Supreme Court has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2-2(3)(j) (1996). Pursuant to Utah Code Ann. § 78-2-2(4) (1996), this appeal was assigned by the Supreme Court to the Court of Appeals by order dated March 19, 1997.

Issues Presented on Appeal and Standard of Review.

(a) Does the Architectural Committee of the Mt. Olympus Cove Subdivision No. 3 ("the Subdivision") have standing to bring an action against a property owner in the Subdivision to enforce the restrictive covenants of the Subdivision? As this issue is a matter of law, this Court should accord the trial court's rulings no deference, but should apply a correction-of-error standard of review. *Asay v. Watkins*, 751 P.2d 1135 (Utah 1988); *Bennion v. Graham Resources, Inc.* 849 P.2d 569 (Utah 1993).

(b) If the Architectural Committee does not have standing to bring an action in its own name, did the trial court err in striking the first amended complaint that included as joined plaintiffs three Subdivision property owners who are members of the Architectural Committee? The standard of review of a denial to amend pleadings is abuse of discretion. *Kasco Services Corp. v. Benson*, 831 P.2d 86 (Utah 1992), *citing Cheney v. Rucker*, 14 Utah 2d 205, 211, 381 P.2d 86, 91 (Utah 1963). *See also* Utah R. Civ. P. 17(a) (reasonable time allowed to amend for "real party in interest"); Utah R. Civ. P. 15(a) (leave to amend to be freely given when justice so requires); *Bekins Bar V Ranch v. Huth*, 664 P.2d 455, 464 (Utah 1983).

(c) If the Architectural Committee does not have standing to bring an action in its own name, did the trial court err in denying the motion to file the second amended complaint that named as plaintiffs just three Subdivision property owners who are members of the Architectural Committee? The standard of review is stated in paragraph (b) above.

The issues for which review is sought are related to summary dismissal of the original and amended complaints on pre-trial motions and, by their nature, have been preserved for review. [*E.g.*, R. 233-42; R. 379-96] In addition, the Architectural Committee filed an Objection to Draft Order on October 29, 1996, which points out the improper factual basis on which the order appears to be based. [R. 501-03]

Determinative Constitutional Provisions, Statutes, Rules and Regulations.

Appellant Architectural Committee has standing to bring an action in this case pursuant to the Utah Supreme Court's holding in *Utah Restaurant Assoc. v. Davis*

County Board of Health, 709 P.2d 1159 (Utah 1985). Alternately, under the standards of review set forth in the cases cited above and Utah Rules of Civil Procedure 17(a) and 15(a), the trial court unlawfully rejected the Committee's attempts to amend the original complaint. Rule 17(a) provides:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

The portion of Rule 15(a) relevant in this case is (emphasis added): "[A] party may amend his pleading only by leave of court or by written consent of the adverse party; and *leave shall be freely given when justice so requires*."

II. STATEMENT OF THE CASE

Nature of the Case.

The action below was brought to enforce the provisions of Covenants governing construction in the Subdivision. Originally (and correctly), the action was brought solely by the unincorporated Committee, which is responsible for the interpretation of the covenant at issue. The Committee challenged certain construction that Defendant Kabatznick had undertaken in the Subdivision. Later, in response to the trial court's concerns regarding standing, three individual property owners, who were members of the Committee, also joined as separately named plaintiffs. Apparently, because the Committee remained named as a co-plaintiff, or because the individual plaintiffs did not constitute a sufficient part of the membership of the Committee, the trial court dismissed the entire action, refusing to allow further amendment to

delete the Committee as a named plaintiff. Thus, the court below dismissed not only the Committee's claims, but the claims asserted individually by the three Committee member-property owners.

Course of Proceedings.

As soon as it became clear to residents of the Subdivision that Kabatznick intended to demolish the existing residence on Lot 28 of the Subdivision and build an entirely new structure and not simply to remodel the then-existing residence, and to do so without complying with the Subdivision's Restrictive Covenants (the "Covenants"), the Architectural Committee filed this action on June 13, 1995.

Trial was originally scheduled for February 28, 1996. The trial court subsequently granted Kabatznick's motion to continue the trial,[1] and a new trial date of July 9, 1996, was established.

On May 17, 1996, Kabatznick filed a motion to dismiss the action, claiming that the Architectural Committee did not have standing to bring the action.

On June 25, 1996, the District Court heard oral argument on Kabatznick's motion to dismiss the action in this case for lack of the Committee's standing. On June 26, 1996, the court issued a bench ruling by telephone conference call, indicating that (i) the Utah Supreme Court case of *Utah Restaurant Assoc. v. Davis County Board of Health*, 709 P.2d 1159 (Utah 1985), should be applied to the action, (ii) Defendant's motion to dismiss for lack of Plaintiff's standing should be denied, (iii)

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[1]Kabatznick had conducted extensive discovery through this period, but did not raise the standing issue when it sought more time for discovery, waiting until 11 months had elapsed after the action had commenced.

the Architectural Committee should file an amended complaint by July 1, 1996, to join or substitute[2] Committee member-property owners as plaintiffs to the action, and (iv) the trial scheduled for July 9-11, 1996, should not be postponed.[3]

An Amended Complaint was filed on July 1, 1996, joining as plaintiffs three members of the Architectural Committee who hold property interests in their residences in the Subdivision: Joyce K. Ridd, James B. Streisand, Robert B. Wray. [R. 344-60] The Amended Complaint differed from the original complaint only in the factual allegations identifying the newly joined plaintiffs. No additional causes of action or underlying facts were alleged or stated.

On July 2, Kabatznick filed an "emergency motion" to strike the amended complaint, renewing her prior motion to dismiss the original action.

Disposition by the Trial Court.

In response to Kabatznick's July 2 motion to dismiss, the district judge continued the July 9 trial setting without date and heard oral argument on the motions on September 30, 1996, at which time he issued a bench ruling granting Kabatznick's motion to strike the Amended Complaint and dismissing the original action.

On October 15, 1996, the Committee and three Subdivision property owners

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[2]As discussed below at page 20, the trial court's November 8, 1996, order of dismissal refers to "joinder *in* substitution." [R. 520-21] The Committee can locate no such phraseology in the Rules of Civil Procedure or in Utah cases. Utah R. Civ. Proc. 17(a) refers to "joinder *or* substitution," and that was the phrase the Architectural Committee understood to be invoked by the trial judge in his June 26 bench ruling.

[3]There was apparently no record made of this conference call/bench order. In response to counsel's letter requesting a transcript in the proceedings, including the June 26, 1996, conference call, the "Reporter's Transcript of Filing Appeal Transcript," dated December 23, 1996, bears the note "No recording of telephone conference." [R. 533]

filed a motion seeking the trial court's leave to file a second amended complaint in the names of the three Committee member-property owners *only* (eliminating the Architectural Committee as a named party), but otherwise unchanged from the original complaint. [R. 478-96]

By "Order Striking Plaintiff's Amended Complaint and Order of Dismissal for Lack of Plaintiff's Standing," dated November 8, 1996 ("the November 8 order"), and entered by the District Court for the Third Judicial District on November 18, 1996, the case was dismissed. The Committee's motion for leave to file a second amended complaint in the names of the three Committee member-property owners only was also denied as moot by the November 18, 1996, minute entry.[4]

Brief Statement of Facts.

Mt. Olympus Cove Subdivision No. 3 was formed in 1966 and is located in Salt Lake County, Utah. On May 10, 1966, the Subdivision, through its owner, adopted Restrictive Covenants applicable to Lots 2-49 of the Subdivision. The Covenants were duly recorded in the records of the Salt Lake County Recorder shortly after their adoption. [R. 2, ¶¶ 1-4; R. 18-19, ¶¶ 1-4]

The Covenants created an Architectural Committee initially consisting of Mr. David Richards and those appointed by him. [R. 9] The Appellant Architectural Committee was duly constituted by Mr. Richards pursuant to the Covenants and consisted of seven residents of the Subdivision at the time of the filing of this action, at least three of whom held property interests in the Subdivision.

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[4]The November 8 Order and November 18 Minute Entry are included in the Addendum.

Pursuant to the Covenants, the Architectural Committee has the responsibility to review and approve plans for major construction of buildings in the Subdivision:

> No building shall be erected, placed, or altered on any premises in said development until the building plans, specifications, and plot plan showing the location of such building have been approved as to conformity and harmony of external design with existing structures in the development, and as to location of the building with respect to the topography and finished ground elevation by an architectural committee composed of David K. Richards and other members selected by him or by a representative designated by the members of said committee.

Subdivision Restrictive Covenants, Art. I. [R. 9]

Kabatznick is the owner of record of Lot 28 of the Subdivision (3944 Lares Way, Salt Lake City, Utah). Some time in 1994 or 1995, Kabatznick retained a contractor to design and serve as general contractor for a comprehensive demolition of the then-existing residence on Lot 28 of the Subdivision and the construction of an entirely new residence on that lot ("the Project"). Demolition and construction work on the Project have been under way since early to mid-1994. [R. 3; ¶¶ 7-9; R. 19-20, ¶¶ 7-9]

It is undisputed that, prior to February 24, 1995, neither Kabatznick, nor her contractor nor any agent for either of them contacted the Architectural Committee pursuant to the terms of Article I of the Covenants to obtain approval "as to conformity and harmony of external design with existing structures in the development." [R. 3, ¶ 9; R. 20, ¶ 9]

By letter dated February 16, 1995, the Architectural Committee requested that Kabatznick contact the Committee and present plans for the Committee's consideration pursuant to the standards set forth in the Covenants. [R. 13-14]

In response to the letter, a representative of Kabatznick's contractor delivered a set of the plans for the Project to the Committee. At a meeting of the Committee held on February 28, 1995, the Committee studied and discussed the plans and unanimously rejected them as "not in conformity and harmony with existing structures in the Subdivision." This determination of the Architectural Committee was communicated to Kabatznick and Spectrum by letter dated March 1, 1995. [R. 4, ¶ 13; R. 15; R. 20, ¶ 13] Subsequent informal attempts to resolve the dispute were unsuccessful.

In direct violation of the provisions of the Covenants, Kabatznick had begun, continued to, and today continues to erect a new structure on Lot 28. The already-completed portions of the construction and any continued construction of the Project, not having received the approval of the Architectural Committee, do not fulfil the procedural and substantive terms of the Covenants of the Subdivision and are in direct violation of those Covenants.

This action was commenced on June 13, 1995, to enforce the Covenants, as the residents of the Subdivision are being deprived of a significant element of the benefits of their ownership and residence in properties in the Subdivision, as provided in the Covenants.

Summary of the Argument.

The Architectural Committee was formed under the Restrictive Covenants to uphold certain architectural standards in the Subdivision. Kabatznick has openly and admittedly failed to comply with the terms and conditions of Article I of those Cove-

nants. As the relief sought under this lawsuit is directed only to actions required of Kabatznick, with uniform effect on the individual Subdivision property owners, the Architectural Committee has standing to bring an action to enforce those Covenants under *Utah Restaurant Assoc. v. Davis County Board of Health*, 709 P.2d 1159 (Utah 1985), and the trial court was in error to dismiss the case for lack of standing.

Alternately, *if* the Committee is without the requisite standing, *any* property owner has the required standing (as conceded by Kabatznick [R. 553]). Under Utah Rule of Civil Procedure 17(a) and *Intermountain Physical Medicine Associates v. Micro-Dex Corp.*, 739 P.2d 1131 (Utah Ct. App. 1987), the trial court abused its discretion in striking the first Amended Complaint, which had—in compliance with the trial court's instructions—joined to the action three property owner-Committee members. Finally, if the lawsuit could not go forward with the Architectural Committee as a named co-plaintiff with the three individual residents, it was an abuse of discretion under Rules 17(a) and 15(a) and *Micro-Dex* to deny the timely motion for direct cure by *substituting* the three property owners and formally deleting the Committee as a named plaintiff.

Attempts were made to do both in a very short time period,[5] and the trial court's actions dismissing or striking these pleadings was an unlawful abuse of discretion.

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[5]The attempt to comply by joinder of three individual property owners was filed on July 1, 1996, only five days after the trial judge's instructions from the bench. After he indicated from the bench on September 30, 1996, that he would strike the joinder pleading, the attempt to cure by seeking to amend by substitution was made on October 15, 1996—three weeks prior to execution of the trial court's order of dismissal on November 8, 1996.

III. ARGUMENT

A. UNDER *UTAH RESTAURANT ASSOC. V. DAVIS COUNTY BOARD OF HEALTH*, THE ARCHITECTURAL COMMITTEE HAS STANDING TO BRING SUIT AGAINST A PROPERTY OWNER WHO VIOLATES THE RESTRICTIVE COVENANTS OF THE SUBDIVISION.

Standing Under the Utah Restaurant Association *Case.*

Kabatznick has argued, and the trial judge apparently finally agreed, that the Architectural Committee did not have standing to bring an action to require a property owner in the Subdivision to comport with the Covenants of the Subdivision.

It is conceded at the outset that the Committee is not a corporation, not a partnership, nor any other similar formal legal entity, nor does it own any property in the Subdivision. It is a creation under the original Restrictive Covenants of the Subdivision and was formed to provide a means for the Subdivision's residents to see that certain aspects of the Covenants were adhered to by those residing in the Subdivision.

The Committee is the type of organization that the Utah Supreme Court considered in *Utah Restaurant Association v. Davis County Board of Health*, 709 P.2d 1159 (Utah 1985). Where the standing of a Utah restaurant association was at issue, the Supreme Court applied a test articulated in the U. S. Supreme Court case of *Warth v. Seldin*, 422 U.S. 490, 511 (1975): An association has standing to sue if (i) the individual members of the association have standing to sue; and (ii) "the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the case." *Restaurant Association*, 709 P.2d at 1163.

In the case before this Court, both criteria are satisfied. The individual property owners have standing to sue; there is no dispute about this issue. Further, the participation of the individual property owners is not an indispensable ingredient to this action. Indeed, the individual property owners play no role in this matter except as constituent members of the Committee. The relief sought here is directed specifically at the Kabatznick building and does not involve different relief for different Subdivision property owners. Although the Utah Supreme Court did deny standing to the Utah Restaurant Association with respect to its attempt to seek individual refunds of fees for its members (because part (ii) of the *Warth* test was not satisfied), it granted standing to the association with respect to its request for general injunctive and declaratory relief from the county board's action that had a common effect on all the association members. *Id.*

Similarly, in the case before this Court, the Architectural Committee is seeking injunctive relief against an action that has a common effect on all the members of the Committee and the Subdivision—namely, a violation of the Covenants that affects the Subdivision owners at large.

Justice Zimmerman, writing for a unanimous court in *Restaurant Association*, outlined policy reasons that apply directly in this case:

> Where, as a practical matter, the rights asserted and the remedies sought do not require direct participation by affected individuals who would have standing, there is no reason not to permit associations to press claims common to their members. This approach to standing has the advantage of permitting the prosecution of legitimate claims by an entity with the capacity to spread the costs of litigation among its members and to assume the burdens incident to it, rather than requiring a single litigant to carry the entire load.

The facts in this case directly match up with this discussion: The Subdivision's residents have a legitimate common claim against Kabatznick, and the Committee is an entity that has the capacity to spread litigation costs among the Subdivision residents. The opinion went on to note that:

> To deny an association standing under such circumstances just might deter the assertion of valid claims without serving any countervailing purpose. We decline to take such a sterile approach to standing and adopt the [*Warth*] test above for determining an association's standing to sue.

Id. This statement directly applies to the Committee's action and captures the sense of fair and proper treatment of a common grievance that affects a group such as the Subdivision residents, acting through its Architectural Committee. The Architectural Committee's claim here is "common to its members" and does not require the participation of each individual property owner.[6]

The Covenants' Provision for Filing Suit.

Another supposed basis for dismissal that is cited in the trial court's order is that the Architectural Committee has no standing because the Subdivision's Restrictive Covenants do not expressly give it the power to bring legal action in Utah courts. [R. 521] The Covenants provide:

> If the parties hereto, any of them, or their heirs, or assigns, shall violate or attempt to violate any of the Covenants herein, it shall be

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[6]In a similar case with an element even closer to the one before this Court, an association had standing to enforce subdivision covenants, even though some of the members of the association did not own property in the subject subdivision. *Conestoga Pines Homeowners' Assoc. v. Black*, 689 P.2d 1176 (Colo. Ct. App. 1984). This is analogous to the case here, where three of the Committee members do not own Subdivision property interests (although their spouses do).

> lawful for any other person or persons owning any real property situated in said tract, to prosecute any proceedings at law or in equity against the person or persons violating or attempting to violate such Covenant . . . .

Restrictive Covenants, Art. XIV [R. 12-13][7]

However, this provision does not serve as a limitation of any rights that another entity might have at common law or by statute.[8] The language itself is not limiting; rather, it is permissive. It does not read, as Kabatznick argued, that *no* other entity except persons owning real property in the tract may seek to enforce the Covenants. Quite simply, the permissive language in the Covenants does not foreclose a common-law right of an organization to bring an action in its own name to carry out the duties given to under to it under the original formative document—the Covenants.

It is entirely appropriate that there be a means for the Subdivision as a whole to protect itself from violation of the architectural standards set forth in the Covenants. Allowing the Committee to take action consistent with its substantive review duties is consistent with the reasoning of *Utah Restaurant Association*. The fact that the Covenants provide expressly for an individual claim by subdivision property

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[7]The copy of the Covenants that both parties have cited in these proceedings is a conformed copy of the recorded covenants which omitted the heading "XIV" at the beginning of the quoted provision. It, therefore, appears in the conformed revision as part of Art. XIII.

[8]Indeed, it is not clear that the Covenants could abrogate the rights of all possible litigants concerning the benefits and entitlements of the Covenants. Although the facts are not congruent with the present case, *Village of Los Ranchos de Albuquerque v. Shively*, 791 P.2d 466 (N.M. Ct. App. 1989), provides an example of an entity (the village containing the subdivision) that had standing to enforce restrictive covenants to which it was not a direct party.

owners to sue in their own rights as well does not change the right of the Committee to enforce the Covenants as an association.

B. IF THE ARCHITECTURAL COMMITTEE DID NOT HAVE STANDING, THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING ATTEMPTS TO JOIN OR SUBSTITUTE COMMITTEE MEMBER–PROPERTY OWNERS

The First Ruling (June 26, 1996).

After receiving memorandums and hearing oral argument on Kabatznick's initial motion to dismiss for lack of standing, the trial court conducted a telephone conference call on June 26, 1996.[9] To the best of Committee counsel's recollection of that conference call, the trial judge denied Kabatznick's motion to dismiss, indicated that the *Utah Restaurant* case was applicable to the case, and instructed the Committee to amend its original complaint by "joinder or substitution"[10] to include *all* Committee members who were property owners in the Subdivision, such amendment to be filed within five days.[11]

The judge's instructions were puzzling to the Architectural Committee: If the Committee *did* have standing under an application of *Utah Restaurant*, why would

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[9]This proceeding was not recorded. *See* note 3, *infra*.

[10]There is confusion about the connective in this phrase. The trial court's order (drafted by Kabatznick's counsel) uses the phrase "joinder *in* substitution" three times. [R. 520-21] No such phrase exists in Utah statutes, court rules or judicial cases. All references that use these two terms together use the conjunctive "or." The significance is that the Architectural Committee believed it was given the option of joinder *or* substitution of parties. It initially chose joinder. The trial court's final order suggests, but does not explicitly say, that simple joinder was improper.

[11]There is no dispute that some of the Committee members did not hold ownership interests in the Subdivision, although in all such cases, the Committee member's spouse was an owner of record.

any individuals need to be joined (or substituted)? If the Committee *did not* have standing, why would any more than one individual property owner have to be joined or substituted (much less that they would have to be Committee members)? The significance of joining/substituting only property owner-members was never explained—either from the bench or in the court's November 8 order. Nevertheless, the Committee made every attempt to comply with the June 26 oral instructions.

As required by the judge, the Committee filed an Amended Complaint differing from the original complaint only by the joinder of three Committee members who owned property in the Subdivision: Robert B. Wray, James B. Streisand, and Joyce K. Ridd.[12] Dr. Wray and Dr. Streisand have been Committee members since April 7, 1995. [R. 428-31] Ms. Ridd is a Committee member who was appointed on April 13, 1996, to fill a vacancy created by the August 30, 1995, resignation of Janet Mann. [R. 394-95]

The Final Order Entered November 8, 1996.

Kabatznick then filed an "emergency motion" to: reargue the standing issue; object to the inclusion of Ms. Ridd and the exclusion of Committee member Richard G. Harman from the Amended Complaint; and renew the motion to dismiss. Briefs were submitted and the trial judge heard oral argument, after which he granted Kabatznick's motion to dismiss, citing that the Committee had not complied with "the narrow permissive grant" given on June 26.

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[12]Committee member Nadine Williams, who held an indirect interest in her residence through a family trust, declined to join as a named plaintiff—either directly or as a trustee. Her absence from the amended complaint was not raised as an issue by Kabatznick nor addressed in the November 8 final order.

Analysis. The trial court's abuse of discretion can be seen by considering the facts and proceedings from two somewhat separate points of view. First, a direct application of Rule 17(a), Rule 15(a) and *Intermountain Physical Medicine Associates v. Micro-Dex Corp.*, 739 P.2d 1131 (Utah Ct. App 1987), establishes all the ingredients for permitting, as a matter beyond the court's discretion, one or the other of the Committee's amended complaints. Second, an analysis of the trial judge's final November 8, 1996, order demonstrates that there is no supportable foundation based on the record for denying both attempts to amend and dismissing the action.

Rule 17(a) and Micro-Dex. Assuming for this argument that the Architectural Committee did not have standing to pursue the action solely in its own name, Utah R. Civ. Proc. 17(a) and 15(a) and this Court's conclusion in *Micro-Dex* dictate that the action should have been permitted to go forward under one of the two amended complaints. Rule 17(a) provides the foundation:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

The *Micro-Dex* court cites this rule in its analysis of a case similar to the current one:

> A plain reading of Rules 17(a) and 19(a) reveals that the trial court should make every effort to insure that the proceeding adjudicates the rights of those necessary and intended to be before the court. In conjunction with this basic concept is the requirement in Utah R. Civ. Proc. 15(a) which states that leave shall freely be given to amend a pleading when justice so requires.

739 P.2d at 1133.

The arguments and positions on the merits of the case had been well-established months before Kabatznick raised the standing issue and would not in the slightest way have been altered by any necessary technical changes to the named parties on the complaint. The residents of the Subdivision have a legitimate grievance concerning the enforcement of their Restrictive Covenants. The interests of justice have been particularly ill-served by the dismissal of a lawsuit before any aspect of the merits of this case had been put before the trial court. There was and is no reason to force parties and individuals back to "square one." Indeed, in a case in equity of this type, it is important to keep sight of the Architectural Committee's timely actions in the proceedings. At each juncture, the Committee has sought to expedite the proceedings to minimize any dislocation or expense to Kabatznick in the event equitable relief is granted.[13] Conversely, these efforts have been met by delay and requests for extension of the proceeding by Kabatznick at nearly every point.[14]

Utah courts use a three-element test articulated in *Regional Sales Agency, Inc. v. Reichert*, 784 P.2d 1210, 1216 (Utah Ct. App. 1988), for analyzing the appropriateness of permitting an amended pleading: timeliness, justification, and extent of prejudice to the other party. The Committee's amendments that were filed in at-

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[13]*E.g.*, a request by the Committee for an early scheduling conference [R. 53-54]; Committee motion for expedited trial [R. 79-84]; Committee opposition to Kabatznick's motion to vacate the trial schedule [R. 129-35].

[14]Including two improper, unsuccessful and time-consuming attempts by counsel for Kabatznick to depose the Committee's counsel. [R. 153-54; R. 162-84; R. 211-24; R. 278; R. 338-40]

tempts to satisfy the trial court's instructions easily satisfied all three criteria: Both amendments were filed within days of the court's rulings; the trial court's instruction that property-owner members become named plaintiffs is *per se* adequate justification; and, under either amended complaint, there would have been no prejudice to Kabatznick—nothing material to the resolution of the action had been changed from the original complaint.

In *Kasco Services Corp. v. Benson*, 831 P.2d 86, 92-93 (Utah 1992), the Supreme Court found an abuse of the trial court's discretion in denying a motion to amend where there was no indication of prejudice to the other party—even though the amendment involved a new issue. The application is all the stronger in the Committee's case, as the court-instructed amendments are merely technical ones that involve no new issues, no new alleged facts, no new theory of the case, and no change in the requested relief. *See also Slattery v. Covey & Co., Inc.*, 857 P.2d 243, 248 (Utah Ct. App. 1993); *Bekins Bar V Ranch v. Huth*, 664 P.2d 455, 464 (Utah 1983).

Finally, in a situation that has some similarities to this case, the Utah Supreme Court has stated the general principle that, "Our rules of procedure are intended to encourage the adjudication of disputes on their merits . . . ." *Bonneville Tower Condominium Management Committee v. Thompson Michie Associates, Inc.*, 728 P.2d 1017, 1020 (Utah 1986). It is true that, in *Bonneville*, the action was dismissed with prejudice and the dismissal of the Committee's complaint was apparently without

prejudice.[15] But the general principle articulated in *Bonneville* has application here because of the equitable nature of the relief sought. This lawsuit should have gone forward, and the Committee (and/or appropriate individuals) should have been allowed to make their arguments on the merits, including the significance of timely and punctual nature of Committee actions to obtain equitable relief. To force them to initiate a separate action 18 months later deprives them of their opportunity to an "adjudication on the merits" as they existed at the time this action in equity was originally brought.

In the context of Rule 17(a), Rule 15(a),[16] the *Micro-Dex* analysis, and the other case-law cited above, the trial court unlawfully abused its discretion in denying the Committee and three of the Subdivision's residents the right to make a technical amendment to the original complaint and allow the action to go forward.

Analysis of the November 8 Order. The trial court's "Order Striking Plaintiff's Amended Complaint and Order of Dismissal for Lack of Plaintiff's Standing" states that the court "had discretion to permit Plaintiff's individual members owning property to *join in substitution*" [R. 520-21 (emphasis added)], and imposed the condition that, "if all such member owners immediately joined[,] the court would deny the motion to dismiss and permit the action to proceed." The order characterizes this as a "narrow permissive grant afforded by the court" and concludes that

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[15]The order is actually silent on this issue, but Kabatznick has already conceded that the matter could be refiled. [R. 553]

[16]After a first amendment, a complaint may be amended by leave of the court, "and leave shall be freely given when justice so requires." Utah R. Civ. Proc. 15(a).

the Committee did not pass the test for the following reasons:

(1) The first Amended Complaint left the Committee as a named co-plaintiff. In discussing this aspect, the November 8 order uses the phrase "join[der] in substitution" three times. This phrase is not found in Utah law, and the Committee had understood the trial court's oral instructions to be to amend by joinder *or* substitution, as that phrase is used in Rule 17(a). The Committee had elected to *join* three Committee members, rather than *substitute* them, an option it had understood was available pursuant to the oral requirement of the trial judge on June 25 and one that seemed consistent with the conjunctive wording in Rule 17(a)—"joinder or substitution of [ ] the real party in interest." If the trial court had concluded on June 26 that the Committee should be totally excised from the caption of the pleading, it was certainly not clear in the conference call with counsel. But, even if that were the trial court's view, such a technicality could have been easily cured by simply dismissing out the Committee as a named plaintiff or—later—granting the motion to file the Second Amended Complaint, which substituted individual plaintiffs rather than joining them. In sum, complete dismissal over a possible technical failure to remove the Committee as a co-plaintiff when the June 26 oral instructions from the trial judge were less than clear on this point is not a proper use of judicial discretion. Any technical deficiency could have been simply and easily cured, as required under Rule 17(a).

(2) The Committee failed to join a Committee member who had earlier owned property in the Subdivision, a reference to Richard G. Harman. While

the statement is true, it is irrelevant to the question of a viable amendment. In addition, the order fails to account for Mr. Harman's unrefuted affidavit, which established that he no longer held title to the property on July 1. [R. 396] *Catch 22* is alive and well here: If the Amended Complaint had included Mr. Harman, there would presumably have been a (perhaps justifiable) motion to dismiss for his lack of standing. When his name was omitted, it was cited as a basis to dismiss the lawsuit. Under any coherent theory of who can bring an action in this situation, the omission of Mr. Harman is wholly irrelevant. The fact that he disposed of his property between the time that Kabatznick's counsel conducted discovery and July 1, 1996, for reasons unrelated to this action, doesn't constitute reasonable grounds to strike the Amended Complaint.[17]

(3) The joinder of a property owner who was not a Committee member when Kabatznick's counsel conducted discovery—Ms. Ridd. This is similarly irrelevant to the question of properly amending the complaint. Indeed, the inclusion of this person was in *direct* compliance with the trial court's bench order on June 26. As Mr. Bardsley's unrefuted affidavit establishes, Ms. Ridd had been a Committee member since April 13. 1996. [R. 394] That she was not a Committee member at some earlier time when opposing counsel served discovery requests is unrelated to

[17]As Mr. Harman's affidavit explains, he had previously represented that he thought his property had been conveyed to his wife in connection with a previous transaction. On learning that this was not the case, he undertook to make the conveyance. [R. 396] This action was a private choice by Mr. Harman that had (and has) no bearing on the viability of the lawsuit—either as originally filed or as amended.

the propriety of her joinder at some later time.[18] To the extent that the trial judge relied on Ms. Ridd's status as a replacement Committee member in dismissing the action, there is no legal justification to have done so. Her inclusion on the Amended Complaint was in direct compliance with the court's June 26 order.

(4) The November 8 Order concludes that only two of the seven persons who were Committee members when Kabatznick had conducted discovery months earlier were named. An old-fashioned demurer might be imposed here: The observation is true, but why would this fact defeat the amendment? Why is the "snapshot" when Kabatznick did some discovery an important indicator of whether a property owner could be joined or substituted? Assuming for this argument that the Committee has no standing under *Utah Restaurant*, the court was bound under Rule 17(a) not to "dismiss[ ] an action on the ground that it is not prosecuted in the name of the real party in interest" until a chance to cure has been afforded. Such a remedy does not require a particular number of parties—even under Kabatznick's theory of the case adopted by the trial court. One property owner as plaintiff would have been sufficient. Three were actually named, and there was no dispute concerning the standing of Committee member/property owners Dr. Wray and Dr. Streisand to

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[18]*At most*, it might have argued for a slight postponement of the trial schedule, although the Committee believes that such a change in membership had no direct bearing on the actions of the parties that are relevant to the action and the remedy sought. The material, relevant facts to the dispute unfolded long before Ms. Ridd joined the Committee as a replacement member. Kabatznick argued strenuously that Ms. Ridd was "unknown to Defendant" (a phrase repeated in the trial court's order). As the record shows, Defendant was well aware of a vacancy on the Committee as early as January 5, 1996, [R. 101, ¶ 15; R. 115; R. 132, n. 2] and made no subsequent attempt to determine if the vacancy had been filled. Even if it were material (it isn't), the late discovery of Ms. Ridd by Kabatznick has no effect on the merits of the case.

bring this action. In its simplest terms, even if the Committee does not have standing to bring an action, these two individuals would have been enough to sustain it, quite independent of the status of Mr. Harman and Ms. Ridd. The trial court was required to resume the action under one of the amended complaints.

Finally, the trial court's November 8 order gives the following reasons for dismissing the Committee's actions [R. 521]:

(1) The Committee owns no property in the Subdivision. This conclusion is not in dispute and is not related to the Committee's standing under *Utah Restaurant* nor to the issue of amending the complaint by joinder or substitution.

(2) The Covenants do not expressly provide to the Committee the right to bring an action to enforce the Covenants. The Committee agrees there is no express provision, but believes (as discussed on page 12, *infra*) that such an omission does not proscribe the Committee's ability to bring this action. In any event, such a conclusion is irrelevant to the issue of permitting a proper amendment by joinder or substitution of property owners as plaintiffs.

(3) The Committee "cannot be said to have any express or implied authority under the covenants to act on behalf of lot owners." This is simply a restatement of the second finding above and, again, does not address the question of joinder or substitution of property owners as plaintiffs.

Quite apart from the analysis of whether the trial court abused its discretion under Rules 17(a) and 15(a), the foregoing point-by-point examination of the November 8 order demonstrates no rational path to the conclusion that neither of the

Committee's amended complaints was in compliance with the June 26 instructions. Three Subdivision property owners who were Committee members on the filing dates of the amended complaints were named as plaintiffs. Three other members did not have property interests, and the seventh member held a property interest only indirectly through a family trust. Not only was this direct compliance with the court's instructions, it stands on its own as a legitimate procedure under Rules 17(a) and 15(a), rejection of which was an abuse of judicial discretion.

To summarize, the trial court's order dismissing the Committee's complaint and rejection of the court-induced amended complaints is an unlawful abuse of discretion under even the most restrictive application of the *Micro-Dex* case and Rules 17(a) and 15(a). Further, to the extent that the court's order is based on Kabatznick's non-evidentiary allegations of fact concerning the status of Ms. Ridd and Mr. Harman (some of which were demonstratably wrong),[19] it is also reversible error. Either the initial Amended Complaint or the Second Amended Complaint would have satisfied any technical standing deficiency in the original complaint, and the trial court abused its discretion in rejecting each of them.

Relation Back.

Under the alternate arguments presented in this Part III.B, a remand to the trial court must relate back to the original filing of the action in June 1995. Rule 17(a) is unequivocal on this point: "[R]atification, joinder, or substitution shall have

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[19]The only evidentiary submissions on the subject of Ms. Ridd's and Mr. Harman's ownership interests were contained in the affidavits submitted by the Committee. [R. 394-96]

the same effect as if the action had been commenced in the name of the real party in interest." And the Utah Supreme Court has considered the issue where—as here—the real parties in interest have been aware of the basic thrust of the action: There is a relation back "as to both plaintiff and defendant, when new and old parties have an identity of interest; so it can be assumed or proved the relation back is not prejudicial." "Such is particularly valid where, as here, the real parties in interest were sufficiently alerted to the proceedings . . . ." *Wilcox v. Geneva Rock Corp.*, 911 P.2d 367, 369-70 (Utah 1996) (quoting *Doxey-Layton Co. v. Clark*, 548 P.2d 902, 906 (Utah 1976)). As indicated above, this has particular significance in an action seeking equitable relief. Any argument that Kabatznick might make concerning the timing of filing a complaint would have to go to the date of the *original* complaint. Accordingly, a remand to the trial court would resume this proceeding, with the action having commenced on June 13, 1995.

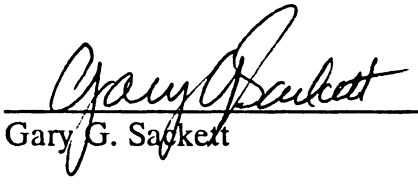
IV. CONCLUSION

WHEREFORE, the Architectural Committee of the Mount Olympus Cove Subdivision No. 3 and its three member-property owners, Robert B. Wray, James. B. Streisand and Joyce K. Ridd, respectfully request that this Court enter its order finding the Architectural Committee had, and has, standing to bring this lawsuit against Appellee Kabatznick and remanding the case to the Third District Court with instructions to reinstate the action originally filed on or about June 11, 1995.

In the alternative, if the Architectural Committee did not have standing to bring suit, the Architectural Committee seeks an order of this Court (a) finding that

the trial court unlawfully dismissed (or denied a motion to file) amended complaints seeking to join three Subdivision property owners of record, (b) remanding the case to the trial court with instructions to proceed pursuant to one of the two amended complaints, and (c) declaring that any such amended complaint relates back to the original June 13, 1995, complaint under Utah R. Civ. Proc. 15(a).

Dated this 18th day of April 1997.



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Addendum
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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ARCHITECTURAL COMMITTEE OF THE MOUNT OLYMPUS COVE SUBDIVISION NO. 3, Plaintiff, vs. AMY E. KABATZNICK, Defendant.	ORDER STRIKING PLAINTIFF'S AMENDED COMPLAINT AND ORDER OF DISMISSAL FOR PLAINTIFF'S LACK OF STANDING Case No. 950904118 CV JUDGE Tyrone E. Medley

Defendant Amy E. Kabatznick's Motion to Dismiss for Plaintiff's Lack of Standing filed May 17, 1996 having been fully briefed by the parties with oral argument heard, the court, on June 26, 1996 announced its ruling by telephone conference with counsel, finding that Plaintiff Architectural Committee lacks standing to commence or maintain an action to enforce the land restrictive covenants since Plaintiff Committee did not own property in the subdivision covered by the covenants and thus would suffer no injury from any alleged violation of the covenants by Defendant and because the express terms of the covenants only grant property owners the right to enforce the covenants with no such right granted to Plaintiff Architectural

Committee. The court however determined that it had discretion to permit Plaintiff's individual members owning property to join in substitution for Plaintiff Committee and if all such member owners immediately joined the court would deny the motion to dismiss and permit the action to proceed. The court ordered Plaintiff to submit appropriate pleadings to make the required joinder in substitution by Monday, July 1, 1996.

On Monday, July 1, 1996, Plaintiff filed an amended complaint adding three individuals, as co-plaintiffs with the Architectural Committee. On July 2, 1996, Defendant Kabatznick filed an emergency motion to strike Plaintiff's amended complaint as not in conformity with the court's ruling on standing and a renewed motion for dismissal of Plaintiff's complaint and for a continuance of the trial. The court granted Defendant's emergency motion for a continuance of trial for the reasons in Defendant's supporting memorandum, including that Plaintiff's amended complaint added a new plaintiff who was not identified as a Committee member in Plaintiff's prior discovery responses and who was unknown to Defendant, which surprised Defendant and created a justifiable need for a continuance to allow further discovery and responsive pleadings.

Defendant's motion to strike Plaintiff's amended complaint and renewed motion to dismiss for Plaintiff's lack of standing, having been fully briefed with oral argument heard on September 30, 1996, the court finds that Plaintiff's amended complaint does not comply with the court's announced decision and order of June 26, 1996, in as much as: (1) Plaintiff's amended complaint leaves the Committee as a co-plaintiff even though the court ruled that the Committee lacks standing; (2) the amended complaint failed to join one of Plaintiff's individual Committee

members who had been identified in discovery responses and by Plaintiff's counsel as owning property in the subdivision but who after being asked to join as a plaintiff submitted an affidavit disclaiming such ownership; (3) it added a plaintiff property owner who had not been identified as a Committee member in any discovery responses and was unknown to Defendant; and, (4) it resulted in only two of the original seven Committee members being named individually as co-party plaintiffs for purposes of any continued action. Since Plaintiff failed to comply timely with the narrow permissive grant afforded by the court for joinder in substitution, the court finds it appropriate to revisit the issue and remedy for Plaintiff's lack of standing.

Accordingly, the court finds that Defendant Kabatznick's motion to dismiss for Plaintiff's lack of standing is well taken for the reasons set forth in Defendant's supporting memoranda: (1) including Plaintiff Committee admittedly owns no property in the subdivision covered by the restrictive covenants and therefore can suffer no real injury from any alleged violation of the covenants; (2) under the express terms of the covenants the right to enforce the covenants for any violation is granted to owners of land in the subdivision and there is no provision granting enforcement rights to the Architectural Committee; and, (3) the Committee was not elected or appointed by the lot owners, nor is it required to be by the terms of the covenants, nor is it conferred with any representative capacity on behalf of lot owners and therefore cannot be said to have any express or implied authorization under the covenants to act on behalf of lot owners in commencing any legal action to enforce the covenants.

Based on the foregoing and for good cause appearing;

IT IS HEREBY ORDERED, that Plaintiff's amended complaint is stricken as not in compliance with the court's ruling and verbal order on standing and joinder, and Plaintiff's complaint and all claims embraced therein are dismissed for want of jurisdiction due to Plaintiff's lack of standing.

DATED this 8 day of Nov, 1996.

BY THE COURT:

Tyrone E. Medley

Honorable Tyrone E. Medley
Third District Court Judge

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE

Kabatznick Disk :\arch-com\order #1808-3

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CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the date hereof, I sent via facsimile and mailed a true and correct copy of the foregoing proposed ORDER STRIKING PLAINTIFF'S AMENDED COMPLAINT AND ORDER OF DISMISSAL FOR PLAINTIFF'S LACK OF STANDING, by depositing the same in U.S. mails, postage prepaid, addressed to the following party and sending the same to the following facsimile numbers:

Gary G. Sackett
Attorney for Plaintiff
180 E. First South Street
Salt Lake City, Utah 84145
Fax No. (801) 534-5131

DATED this 17th day of October, 1996.

Kristi A. Jorgenson

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ARCHITECTURAL COMMITTEE OF THE MOUNT OLYMPUS COVE SUBDIVISION NO. 3	:	**MINUTE ENTRY**
Plaintiff,	:	**CASE NO. 950904118**
vs.	:	
AMY E. KABATZNICK	:	
Defendant.	:	

Plaintiff's Objection to Proposed Order of Dismissal is denied. The Order of Dismissal is signed and entered. Plaintiff's Motion to File Second Amended Complaint is denied as moot.

Dated this 18 day of November, 1996.

TYRONE E. MEDLEY
DISTRICT COURT JUDGE

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry to the following, this 18 day of November, 1996:

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Susan P. Hanley

CERTIFICATE OF SERVICE

I certify that on the 18 th day of April 1997, I caused to be hand delivered ~~by U.S. Mail~~ a true and correct copy of the foregoing Initial Brief of Appellant Architectural Committee to:

L. Benson Mabey
Murphy, Tolboe & Mabey
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Salt Lake City, Utah 84102
Attorney for Amy E. Kabatznick

Gary G. Sackett